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PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1642

ANONYMOUS J. and ANONYMOUS R., Attorneys Admitted to Practice in the State of New York,
Petitioners,

v.

THE BAR ASSOCIATION OF ERIE COUNTY and JOHN B. WALSH, General Counsel to the General Preliminary Investigation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES P. SHEA,
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BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

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IN THE

Supreme Court of the United States

October Term, 1975

No. .....

ANONYMOUS J. and ANONYMOUS R., Attorneys
Admitted to Practice in the State of New York,
Petitioners,

v.

THE BAR ASSOCIATION OF ERIE COUNTY and
JOHN B. WALSH, General Counsel to the
General Preliminary Investigation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on the 3rd day of April, 1975.

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Citations to Opinions Below

The opinion of the District Court is unreported and is printed in Appendix B hereto, *infra*, p. 17. The opinion of the Court of Appeals is unreported and is printed in Appendix B hereto, *infra*, p. 13.

Jurisdiction

The judgment of the Court of Appeals was entered on April 3, 1975, printed in Appendix B hereto, p. 13. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

Where a local bar association disciplinary action is commenced solely on the basis of the immunized testimony of the attorney-respondents therein, is federal relief available to enjoin the proceeding?

Where the Courts of the State of New York have consistently refused to recognize the rights of attorneys, under the Fifth and Fourteenth Amendments of the United States Constitution, in bar association disciplinary proceedings, should the federal courts intervene to prevent those abuses?

Statute Involved

The statutory provision involved is 42 U.S.C. § 1983. It is printed in Appendix A, *infra*, p. 12.

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Statement

Petitioners, attorneys admitted to practice in the State of New York, invoked the jurisdiction of the District Court, under 42 U.S.C. § 1983, to enjoin the Respondents from proceeding with disciplinary actions against them on the grounds that said proceedings were violative of the rights enuring to the Petitioners under the Fifth and Fourteenth Amendments to the United States Constitution.

During the summer of 1971, the Erie County District Attorney's Office had commenced a probe which later ripened into a Grand Jury investigation relative to alleged irregularities in the disposition of certain traffic matters in the City Court of Buffalo.

On December 14, 1971, the Petitioners had been called to testify before the Grand Jury and requested to execute formal written waivers of immunity in regard thereto. On the advice of counsel they had declined to do so. When so advised, the Grand Jury voted them full and complete transactional immunity in return for their testimony. At that juncture and with full transactional immunity bestowed upon them, the Petitioners were compelled to give testimony or suffer the consequences of a contempt citation. Without executing a waiver of immunity, the Petitioners were taken before the Grand Jury and testified. A single indictment was returned against one individual and at the trial thereon, the Petitioners having been immunized as indicated, were called as witnesses and gave testimony. Over a year after their trial testimony and two and one-half years after their Grand Jury testimony, both Petitioners were served with a Petition and Notice of Motion instituted by the Respondent, Bar Association of Erie County, naming both of them and seeking to have them disciplined. Petitioner, ANONYMOUS R. was also named

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in a separate Petition and Notice of Motion, naming him alone and seeking the same punishment.

In the preparation of the Petitions, the Respondents conducted no investigation, interrogated no witnesses, held no hearings whatsoever but prepared them and the charge therein contained wholly and solely from the immunized trial testimony of Petitioners.

The Petitioners commenced the instant action in the United States District Court, Western District of New York, on July 26, 1974, seeking, *inter alia*, a preliminary injunction and final judgment permanently enjoining the defendants from proceeding with disciplinary proceedings against them.

They also sought final judgment declaring that they may not be subjected to disciplinary proceedings on matters for which they were previously granted full transactional immunity and that their compelled testimony, elicited under grants of immunity, cannot be used against them in any manner whatsoever in such proceedings.

The Petitioners proceeded by an Order to Show Cause, granted on July 29, 1974, to secure the preliminary injunction sought pending the entry of final judgment.

The Respondents filed no Answer but instead moved to dismiss the Complaint and Motion for Preliminary Injunction on the grounds that such Complaint failed to state a claim upon which relief could be granted and, further, that the Court lacked jurisdiction of the subject matter.

The Hon. John T. Curtin, on October 17, 1974, granted the defendants' Motion to dismiss the Complaint, without prejudice. The Court below affirmed the Order of the District Court upon the authority of *Younger v. Harris*, 401 U.S. 37 (1971), and *Erdmann v. Stevens*, 458 F. 2d 1205 (2d Cir. 1972), Cert. Denied, 409 U.S. 889 (1972).

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Reasons for Granting the Writ

1. The doctrines enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), upon the authority of which the instant case was decided in the courts below are not applicable to this action and the facts and circumstances of this case differ from those in *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972).

In *Younger*, the court stressed the restraint to be exercised by courts of equity "when the moving party has an adequate remedy at law *and* will not suffer irreparable injury if denied equitable relief." at 43-44. (Emphasis added.)

Assuming an adequate remedy at law is available to the Petitioners through an ultimate appeal to the United States Supreme Court, the injury to be sustained by them, prior thereto, will be great, immediate and irreparable. There is no way to erase from the minds of the public, the disgrace, humiliation and degradation resulting from the notariety attendant to successful bar association disciplinary proceedings.

Contrary to the facts of *Younger v. Harris, supra*, where Harris had an adequate remedy at law and where the denial of injunctive relief would not result in irreparable injury, if these Respondents are allowed to proceed with their disciplinary actions, using the immunized testimony of the Petitioners to sustain the allegations contained in the petitions, the Petitioners herein would suffer great, immediate and irreparable harm, occasioned solely as a result of a deprivation of their constitutional rights—a deprivation routinely and consistently practiced by the State of New York in disciplinary proceedings where Fifth

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Amendment privileges are asserted as a defense or bar. The harm and loss to be suffered by the Petitioners, of course, is the immediate and disasterous loss of livelihood and earning ability which would, with more than a reasonable probability, ensue following a determination by the New York State Supreme Court, Appellate Division, Fourth Department, whether that determination be censure, suspension or disbarment. In accordance with New York State Judiciary Law 90, upon a finding of misconduct, the proceedings no longer remain confidential, as they are supposed to be theretofore, but, rather, become a matter of public record, available to all, including, and most notably, the media.

One of the most valuable assets of an attorney is the image he projects to the public. This public opinion is, in large measure, formed as a result of the esteem with which the lawyer is regarded by members of the bench and bar. The public reporting of the imposition of judicial sanctions, in any manner whatsoever, would severely impair the ability of the Petitioners to successfully, and profitably, practice their profession. Furthermore, and even more drastically, should the Appellate Division order suspension or disbarment, the effective date of such a penalty would be almost immediate and, in any event, in advance of any review by the New York State Court of Appeals or the Supreme Court of the United States. During any period of suspension or disbarment, these Petitioners would be completely and absolutely enjoined from practicing law in the Courts of the State of New York, or even clerking in a law office. An eventual reversal of the Appellate Division determination would not restore the plaintiffs to their present position, either financially or in the eyes of the public.

The real threat of this irreparable, great and immediate loss compelled the plaintiffs to commence this action, and, as explained in *Mitchum v. Foster*, 407 U.S. 225 (1972), the purpose for the existence of 42 U.S.C. § 1983, is to prevent such an occurrence.

In *Huffman v. Pursue, Ltd.*, 95 S.Ct. 1200 (1975), cited in the opinion of the court below, the court focused upon the existence of irreparable injury and remanded that case to the District Court, ostensibly for a hearing, for a determination as to whether that injury, if any, fell within an exception to *Younger*.

2. Traditionally, recently and uniformly, the courts of the State of New York have held that compelled testimony given pursuant to grants of transactional immunity and obtained only as a result thereof, are admissible in bar association disciplinary proceedings despite the existence of the Fifth and Fourteenth Amendments of the United States Constitution, and the Federal Court decisions decided thereunder.

See *In Re Epstein*, 325 N.Y.S. 2d 657, 37 A.D. 2d 333 (1971), motion for leave to appeal denied, 327 N.Y.S. 2d 1076 (1971), motion to dismiss appeal granted, 328 N.Y.S. 2d 1031 (1971), cert. denied, 405 U.S. 1046 (1971); *In Re Selig*, 32 A.D. 2d 213, 302 N.Y.S. 2d 95 (1st Dept. 1969); *Zuckerman v. Greason*, 20 N.Y. 2d 430, 285 N.Y.S. 2d 430 (1967); *Matter of Ungar*, 27 A.D. 2d 925, 282 N.Y.S. 2d 158 (1st Dept. 1967), leave to appeal denied, 20 N.Y. 2d 642, 282 N.Y.S. 2d 1026, 229 N.E. 2d 326 (1967), cert. denied 389 U.S. 1007; *Matter of Farrell*, 27 A.D. 2d 61, 276 N.Y.S. 2d 61 (1st Dept. 1966).

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This refusal to recognize the privilege against self-incrimination has been based on the established, entrenched, New York decisional law which has held that disciplinary proceedings are "civil", in nature and not *criminal* or *quasi-criminal.* (See also *Zuckerman v. Greason*, 285 N.Y. S. 2d L (1968); *In Re Randell*, 158 N.Y. 216, 52 N.E. 1106 (1899), *In Re Lynch*, 227 App. Div. 471, 238 N.Y.S. 482 (1930), *In Re Rothenberg*, 18 A.D. 2d 397, 239 N.Y.S. 2d 591 (1963), *In Re O'Neill*, 184 App. Div. 75, 171 N.Y.S. 514 (1914), *Feola v. New York State Bar Association*, 37 A.D. 2d 789, 324 N.Y.S. 2d 654 (1971).)

These holdings, that disciplinary proceedings are civil in nature, are contrary to the interpretation of such proceedings by the Federal Courts. See *In Re Ruffalo*, 390 U.S. 544 (1968).

Given the New York State Court's traditional unwillingness to apply the protections of the Fifth and Fourteenth Amendment safeguards for the benefit of attorneys in disciplinary proceedings, a request for such recognition would be futile.

Federal Courts will not, and should not, abstain from exercising jurisdiction where recent State holdings on a question of substantive law demonstrate that relitigation of the same issue would have proven futile. *United States ex rel. Lois Sero, et al. v. Peter Preiser*, 506 F2d 1115 (2d Cir. 1974).

Even *Younger* recognized the uselessness of always requiring resort to State Courts, citing *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that

> "The accused should first set up and rely upon his defense in the State Courts . . . *unless it plainly appears that this course would not afford adequate protection.*" 401 U.S. 371, 91 S.Ct. 745, 750 (1971). (Emphasis added)

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The constitutional issue before the Second Circuit in *Erdmann v. Stevens, supra*, was whether the institution of disciplinary proceedings was a violation of his First Amendment rights. The Second Circuit held that New York Courts had the competency to decide these First Amendment questions and recognized that First Amendment rights had always been adequately protected by New York Courts. However, this has not been the case where Fifth and Fourteenth Amendment rights have been involved. As hereinabove discussed, the New York Courts have consistently rejected the contention that the privilege against self-incrimination is available in the context of bar association disciplinary proceedings, and, unlike *Erdmann, supra*, resort to the state courts in the instant case would be futile.

3. Disciplinary proceedings are quasi-criminal, *In Re Ruffalo*, 390 U.S. 544 (1968), and, as such, the transactional immunity which was conferred upon the Petitioners totally insulated and immunized them from any criminal or quasi-criminal proceedings.

The sanctions which may be imposed on attorneys as the result of disciplinary proceedings are of a real significance. These measures constitute punishment, penalty and forfeiture which reflect the quasi-criminal nature of the proceedings in the first instance.

No one can seriously question the fact that censure, suspension from the practice of law or disbarment therefrom constitutes punishment, penalty and forfeiture in a very real sense.

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The instant disciplinary proceedings, in general, and the use of the compelled testimony, in particular, are violative of Petitioners' civil rights and prohibited as unconstitutional in violation of the Fifth Amendment protection against self-incrimination made applicable to the states by the Fourteenth Amendment.

In *Kastigar v. United States*, 406 U.S. 441 (1971), the court held that the Constitution permits testimony to be compelled if neither it nor its fruits are available for use, and that the testimony, as elicited, cannot lead to the infliction of criminal penalties.

The Petitioners having been granted full transactional immunity by the State, must be afforded whatever immunity is necessary to supplant this privilege. *Lefkowitz v. Turley*, 94 S.Ct. 316, 325 (1973).

The immunity extended to a witness must be coextensive with all possible governmental penalties and forfeitures, criminal or civil. *Lurie v. Florida State Board of Dentistry*, Fla. 288 So. 2d 223 (1973).

The State of New York, through its authorized officials, in granting the Petitioners immunity, acts totally for the State. The State is now attempting to nullify that immunity by using the Petitioners' immunized testimony in the disciplinary proceedings.

Had the Petitioners refused to testify, after having received a grant of immunity, they would have been incarcerated for their contempt and, most assuredly, would have encountered bar association disciplinary proceedings seeking to punish them for their refusal to testify. On the other hand, having testified, the Respondents have used,

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and intend to use, that compelled testimony to prosecute its present disciplinary action. Thus, in either event, if the utilization of their compelled testimony is permitted, the Petitioners would be, as they presently are, confronted with a most serious threat to their livelihoods. (See *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967).)

The institution of the disciplinary proceedings, in general and the use of the compelled testimony, in particular, are thus violative of the Fifth and Fourteenth Amendment rights of these Petitioners.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: June 18, 1975.

Respectfully submitted,

JAMES P. SHEA,
Counsel for Petitioners,
Western Building,
15 Court Street,
Buffalo, N.Y. 14202.

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APPENDIX A

Statute Involved

The statutory provision involved is § 1983 of Title 42 of the United States Code.

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX B

Opinions and Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 640, 641—September Term, 1974.

(Argued February 19, 1975 Decided April 3, 1975.)

Docket Nos. 74-2489, 74-2515.

ANONYMOUS J. and ANONYMOUS R., Attorneys Admitted to Practice in the State of New York,
Plaintiffs-Appellants,

against

THE BAR ASSOCIATION OF ERIE COUNTY and JOHN B. WALSH, General Counsel to the General Preliminary Investigation,
Defendants-Respondents.

Before:

ANDERSON, MULLIGAN and VAN GRAAFEILAND,
Circuit Judges.

Appeal from an order of the United States District Court for the Western District of New York, Hon. John T. Curtin, Chief Judge, dismissing a complaint seeking injunctive and declaratory relief against the use of plaintiffs' immunized grand jury testimony by the defendants in disciplinary proceedings pending before the Appellate Division of the New York Supreme Court.

Affirmed.

Philip H. Magner, Jr., Buffalo, New York (Garvey, Magner & Sullivan, Buffalo, New York), for Plaintiff-Appellant J.

Thomas P. Flaherty, Buffalo, New York (Flaherty & Shea, Buffalo, New York), for Plaintiff-Appellant R.

John B. Walsh, Buffalo, New York, for Defendants-Respondents.

PER CURIAM:

Appellants are two attorneys at law admitted to practice in the State of New York. During the summer of 1971, the Erie County District Attorney's Office commenced an investigation into the propriety of the disposition of certain traffic matters in the City Court of Buffalo. Both attorneys were called to testify before the grand jury and both refused to execute written waivers of immunity on the advice of their counsel. The grand jury voted them transactional immunity and both thereupon testified befor the grand jury on May 31, June 1 and June 4, 1973. An indictment was returned against a third person and the appellants testified as witnesses on that trial. On June 11, 1974, the appellants were served with a petition and notice of motion by the defendant Bar Association of Erie County charging them with violations of N. Y. Penal Law §§ 115.00, 100.05 and 105.05, as well as Canons 1, 6, 7, 8 and 9 of the Code of Professional Responsibility. The petitions and motions were returnable on June 25, 1974 before the New York State Appellate Division of the Supreme Court, Fourth Department. On the return date, the matter was adjourned until August 1, 1974. On July 26, 1974, the appellants commenced an action in the United States District Court for the Western District of

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New York seeking preliminary and permanent injunctive relief enjoining the defendants from pursuing the disciplinary proceedings. They also sought a declaratory judgment that their immunized grand jury testimony could not be used against them in any way in the pending disciplinary proceedings. Federal jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983. On July 29, 1974, appellants obtained from Hon. John T. Curtin, Chief Judge of the Western District of New York, an order to show cause why a preliminary injunction should not be issued against the defendants. Defendants filed no answer but moved to deny the motion for the preliminary injunction and dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted.

On October 17, 1974, Chief Judge Curtin issued a decision and order granting the defendants' motion to dismiss the complaint. The court below based its decision upon the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) and its application by this court in *Erdmann v. Stevens*, 458 F.2d 1205, cert. denied, 409 U.S. 889 (1972). The court also stated that it was adopting the reasoning of *Anonymous v. Association of the Bar of the City of New York*, 74 Civ. 2398 (S.D.N.Y. July 31, 1974). The appeal in that case was heard by this panel on the same day as this appeal, and our affirmance there (____ F.2d ____ (1975)) compels affirmance here. The factual situation in both cases is the same in all material respects, the only distinction being that here the disciplinary proceeding had progressed from the Bar Association to the Appellate Division by the time this action was commenced.

Appellants here raise substantially the same arguments presented in *Anonymous v. Association of the Bar, supra,* in an effort to avoid the holding by this court in *Erdmann.* Since these contentions are fully discussed in our opinion in the companion case, repetition is unwarranted.

Appellants, however, do raise one issue not raised in *Anonymous.* They urge that since this action is based upon the Civil Rights Act of 1871, 42 U.S.C. § 1983, it is not subject to the restrictions of the anti-injunction statute, 28 U.S.C. § 2283, or the *Younger* abstention principle. There is no doubt but that a section 1983 action falls within the "authorized by Act of Congress" exception to section 2283. *Mitchum v. Foster,* 407 U.S. 225 (1972). However, it is equally clear that section 1983 is not exempted from the *Younger* abstention doctrine. *Erdmann* itself was a case in which plaintiff's counsel invoked section 1983 but we nonetheless refused to intervene in the state action. In any event, in *O'Shea v. Littleton,* 414 U.S. 488, 499 (1974), the Supreme Court applied the *Younger* principle in a 1983 action, reiterating what it had said in *Mitchum v. Foster, supra,* 407 U.S. at 243, that the *Mitchum* holding was not intended to qualify in any way the principles of comity and federalism. See *Huffman v. Pursue, Ltd.,* 43 U.S.L.W. 4379, 4380 n.1 (March 13, 1975) (*Younger* held applicable in a suit brought under 1983 to enjoin a state civil proceeding).

Affirmed.

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Appendix B—Opinions and Judgment Below

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ANONYMOUS R. and ANONYMOUS J., Attorneys Admitted to Practice in the State of New York,

Plaintiffs,

vs.

THE BAR ASSOCIATION OF ERIE COUNTY and JOHN B. WALSH, General Counsel, Office of General Preliminary Investigation,

Defendants.

Civil 74-364.

Appearances:

Flaherty & Shea (Thomas P. Flaherty, Esq., of Counsel), Buffalo, New York, for Plaintiff R.

Garvey, Magner & Sullivan (Philip H. Magner, Jr., Esq., of Counsel), Buffalo, New York, for Plaintiff J.

John B. Walsh, Esq., Buffalo, New York, for Defendants.

Plaintiffs are attorneys admitted to practice in the State of New York, against whom disciplinary proceedings are pending brought by the Bar Association of Erie County before the New York State Supreme Court, Appellate Division, Fourth Department. Defendants are the Bar Association and John B. Walsh, General Counsel to the Bar Association's Committee on Grievances. Plaintiffs

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seek injunctive relief against defendants' using grand jury testimony given by plaintiffs under a grant of immunity in the disciplinary proceedings. Plaintiffs claim that the proposed use of compelled testimony violates their fifth amendment right against self-incrimination, held applicable to the states by the fourteenth amendment. *See Malloy v. Hogan*, 378 U.S. 1 (1964). Federal jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343 and 2201, *et seq.*, and the federal Civil Rights Act, 42 U.S.C. § 1983.

Before the court is plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss the action for failure to state a claim. Plaintiffs' motion is denied. Defendants' motion is granted.

On December 14, 1971, plaintiffs were called to testify before a grand jury investigating certain alleged irregularities in the disposition of certain traffic matters in Buffalo City Court. Plaintiffs declined to execute written waivers of immunity on the advice of counsel. The grand jury then voted them full and complete transactional immunity. Plaintiffs then were taken before the grand jury and testified. Subsequently the grand jury returned one indictment against one individual and, at the trial, plaintiffs were called as witnesses and gave testimony under the grant of immunity. Plaintiffs testified on May 31, June 1 and June 4, 1973 in Erie County Court.

Approximately on June 11, 1974, the defendant Bar Association of Erie County commenced a disciplinary proceeding against plaintiffs, with defendant John B. Walsh acting as its counsel before the New York State Supreme Court, Appellate Division, Fourth Department. In its petition the Bar Association alleged that the plaintiffs

violated the Penal Code of the State of New York and the Code of Professional Responsibility by reasons of actions and conduct described in the testimony of plaintiffs given before the grand jury and trial jury. The defendants' motions and petitions were returnable on June 25, 1974 before the Appellate Division. The return date was adjourned to August 1, 1974, since extended to September 10, 1974.

Defendants did not hold any hearings for the preparation of the petitions. Plaintiffs' allegation (which must be accepted as true at this stage of the proceedings) is that the charge contained in the petitions derived wholly and solely from the immunized trial testimony of plaintiffs.

Plaintiffs' complaint is dismissed for insufficiency, under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). The disciplinary proceedings in the instant case were commenced on June 11, 1974. The summons and complaint in the federal action were filed on July 26, 1974. Therefore, the state prosecution was pending so as to make federal intervention inappropriate. *Perez v. Ledesma*, 401 U.S. 82, 103 (1971) (Brennan, J. concurring). Further, the pending state bar disciplinary proceeding is quasi-criminal in nature. *In Re Ruffalo*, 390 U.S. 544, 551 (1968); *Erdmann v. Stevens*, 458 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972). *See also*, Place and Bloom, *Mental Fitness Requirements for the Practice of Law*, 23 Buffalo L. Rev. 579, 595 (1974). As Judge Greisa so ably pointed out, *Erdmann* is still the rule in this Circuit and its holding that federal courts should not intervene in a pending state bar disciplinary proceeding binds this court. *Anonymous v. Assoc. of Bar of City of New York, et al.*, 74

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Civ. 2398 (S.D.N.Y. July 31, 1974). This court adopts the reasoning of *Anonymous, supra.*

Defendants' motion to dismiss the complaint is granted, without prejudice.

So ordered.

JOHN T. CURTIN.
United States District Judge.

Dated: October 17, 1974.

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IN THE

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No. 74-1642

ANONYMOUS J. and ANONYMOUS R., Attorneys Admitted to Practice in the State of New York,
Petitioners,

vs.

THE BAR ASSOCIATION OF ERIE COUNTY and JOHN B. WALSH, General Counsel to the General Preliminary Investigation,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI FOR REVIEW OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ENTERED IN THE ABOVE-ENTITLED CASE ON THE 3rd DAY OF APRIL, 1975.

JOHN B. WALSH,
Attorney for Respondents,
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Buffalo, New York 14203.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

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Section 90.2 5

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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1642

ANONYMOUS J. and ANONYMOUS R., Attorneys Admitted to Practice in the State of New York,
Petitioners,

vs.

THE BAR ASSOCIATION OF ERIE COUNTY and JOHN B. WALSH, General Counsel to the General Preliminary Investigation.
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI FOR REVIEW OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ENTERED IN THE ABOVE-ENTITLED CASE ON THE 3rd DAY OF APRIL, 1975.

Opinions Below

The opinion of the District Court is unreported and is contained in the Petitioners' Appendix B, Page 17, thereof. The opinion of the Court of Appeals is unreported and is printed in Appendix B, Page 13 of the Petition.

For the convenience of this Court in reading this brief, we have also included the opinion of the United States Court of Appeals for the Second Circuit in the case of

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Anonymous, an Attorney Admitted to Practice in the State of New York, Petitioner vs. The Association of the Bar of the City of New York and John G. Bonomi, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York, to which the Court of Appeals opinion in this case refers and also the District Court's opinion in that case which is referred to and adopted by the District Court in this case. Both cases were heard by the Second Circuit Court of Appeals at the same time and both contained many similar issues.

Questions Presented

1. Is this a proper case in which to grant a writ of certiorari?

2. Is the federal doctrine of non-intervention in a proceeding presently pending before a State Court as announced in *Younger vs. Harris*, 401 U.S. 37 (1971) and *Huffman vs. Pursue Ltd.*, ____ U.S. ____, 95 Sp.Ct. 1200, 43 L.Ed. 2nd 482 (1975), applicable in this case so that the complaint of the plaintiffs should be dismissed?

3. Should the federal court intervene in this case where prior to the institution of this action a petition was served on the plaintiffs and filed with the New York State Supreme Court, Appellate Division, Fourth Department, by the defendant asking the court to take such disciplinary action as it deemed appropriate in a situation where plaintiffs gave testimony in open court regarding certain alleged irregularities in the disposition of certain traffic matters in the City Court of Buffalo which was reported in the newspapers to the general public and which testimony was a repetition of the testimony that they had given in a

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Grand Jury proceeding after having been granted immunity under the statutes of the State of New York. Such petition being filed with the Supreme Court, Appellate Division, Fourth Department pursuant to Section 90 of the Judiciary Law of the State of New York wherein the State of New York has placed the power of disciplinary proceedings in the Appellate Division of the State of New York?

4. Should the State Courts be given the opportunity to decide the issues in this case, the applicability of the state statutes and the constitutional issues involved or should this Court intervene at this point?

5. Can the lower Court restrain the defendants after they have already filed the petition with the Appellate Division with respect to disciplinary proceedings and if so from what are they restraining them from doing?

6. Can a State Court discipline an attorney in any way including censuring the same for conduct he has admitted in open Court which has been reported in the newspapers and for which he has been given general publicity which conduct is violative of the code of professional conduct and of the penal laws of the State of New York and inform the public that it does not approve of such conduct, or is such discipline including censure such a penalty or forfeiture so the Court is restrained from doing so because of the immunity granted to the plaintiffs in the first instance and should the State Court before which this matter is pending have the first opportunity to make the determination of this question?

Statement of Case

The facts of this case are already stated in the decisions of the District and Circuit Court Opinions which are found in the Appendix to the Petition.

It perhaps bears repeating, however, that in this case a petition had already been served upon the petitioner and the disciplinary proceeding already commenced in the New York Supreme Court Appellate Division for the Fourth Department before this proceeding was commenced in the District Court and only respondents were sought to be restrained from proceeding any further—not the State Court and if the State Court had wanted to, it could have already decided this case without any further action on the part of the respondents because the petitioners did not answer or move against the petition in the State Court.

It should also be noted that while the public is aware of the conduct of the petitioners because of their reported testimony given in Court—they are not aware of any pending disciplinary proceedings by reason of respondents' actions since they are confidential under Section 90 of the New York State Judiciary Law.

Next it should be noted that since the respondents moved to dismiss for failure to state a claim and lack of jurisdiction, respondents recognized that for the purposes of this proceeding the factual allegations in the petition were deemed to be admitted. They denied, however, the allegation that the New York State Courts do not follow the United States Constitution or the rulings of this court and stated that that allegation was not an allegation of fact but one of law and an erroneous one at that.

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This can be seen from the Decision of the District Court on October 17, 1974, which granted the respondents Motion to dismiss the Complaint without prejudice upon the authority of *Younger vs. Harris*, 401 U.S. 37 (1971), and *Erdmann vs. Stevens*, 458 F.2d 1205, 1209 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972) and adopted the opinion of Judge Greisa which opinion is found in *Anonymous vs. Association of Bar of City of New York, et al.*, 74 Civ. 2398 (S.D.N.Y. July 31, 1974) and this result was affirmed by the Second Circuit Court of Appeals on April 3, 1975, on the basis of *Younger vs. Harris*, 401 U.S. 37 (1971) and *Huffman vs. Pursue Ltd.*, 95 S.Ct. 1200 (1975) decided March 18, 1975, where it called attention to the fact that the Huffman case held that Younger was applicable in a suit brought under 1983 to enjoin a state civil proceeding. The Court also reaffirmed its own holding in *Erdmann vs. Stevens, supra.*

ARGUMENT

POINT I

There is no basis for granting a writ.

None of the situations enumerated in this Court's Rule 19 exists here and there is no special or important reason for granting the writ of certiorari prayed for. The decision below was correct.

The disciplining of attorneys in New York is a matter of state interest, entrusted by the state to the Appellate Division of the Supreme Court of the State of New York. Judiciary Law of New York, Section 90.2.

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Prior to the bringing of this proceeding a disciplinary proceeding had already been commenced against the petitioners by service upon them of a petition returnable in the State of New York Supreme Court, Appellate Division, Fourth Department, and thus that Court had jurisdiction in this case at the time this proceeding was brought.

To quote from the brief in opposition to Petition for Writ of Certiorari in Anonymous vs. The Association of the Bar of the City of New York and John G. Bonomi:

> "Under these circumstances, the Court of Appeals correctly held that federal intervention is barred. Its decision is not in conflict with any other circuit and conforms to decisions in three other circuits;* and it is supported by the decisions of this Court. *Huffman vs. Pursue Ltd.*, ____ U.S. ____, 43 L.Ed. 482 (1975); *Geiger vs. Jenkins*, 401 U.S. 985 (1971), affirming 316 F. Supp. 370 (D.C. Ga. 1970); *Younger vs. Harris*, 401 U.S. 37 (1971).
>
> Paraphrasing this Court's language in Huffman (43 L. Ed. at 492), an offense to New York's interest in the disciplining of its attorneys is likely to be every bit as great as it would be in a criminal proceeding; and a federal injunction in this case would disrupt the New York interests which underlie its efforts to protect the integrity of its bar and to obtain compliance with its standards of professional conduct.
>
> Furthermore, there are no special circumstances here calling for the ignoring of the non-intervention rule. See Huffman, 43 L. Ed. at 496."

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* See *Lynch vs. Snepp*, 472 F.2d 769, 773 (4th Cir. 1973): cert. denied, 415 U.S. 983 (1974); *Palaio vs. McAuliffe*, 466 F.2d 1230, 1232-33 (5th Cir. 1972); *Cousins vs. Wigoda*, 463 F.2d 603 (7th Cir.), application for a stay denied, 409 U.S. 1201 (1972).

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POINT II

The granting of the writ would undermine the disciplinary procedure in State Courts and be contrary to the policy of this Court and detrimental to the preservation of our system of administration of justice.

In *Erdmann vs. Stevens*, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972) and in its opinion in this case and in *Anonymous vs. The Association of the Bar of the City of New York* the Second Circuit strongly enunciates the policy of non-intervention in State Bar Proceedings before a State Court because of the undermining influence it would have on the public's attitude to that Court. It has found that the New York Courts follow the U.S. constitution and the rulings of this Court in these matters and certainly this can be demonstrated in the decisions of the New York Courts following the decision of the Supreme Court in *Spevack vs. Klein*, 385 U.S. 511 which overruled *Cohen vs. Hurley*, 366 U.S. 117.

It should be noted that the Chief Justice of this Court only recently in addressing the conference of State Court Judges told them that they were not policing the bar adequately and as a result the public was losing confidence in the integrity of the bar and presenting a threat to our whole system of administration of justice.

To take this matter out of the hands of the State Court before it has uttered one word either denying relief without naming the parties but condemning the act or condemning the act and censuring the parties all of whom are known to the public (so could hardly be interpreted as a forfeiture, penalty or punishment) or take some other action and restrain the Bar Association and its counsel from

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bringing disciplinary proceedings in this case seems to run counter to the Chief Justice's admonition to the State Court Justices.

To illustrate another aspect of this problem, which while it does not concern whether or not a writ of certiorari should be granted in this case, does focus on the problem of professional discipline after the Court learns of testimony given under immunity which becomes public knowledge which ordinarily should call for disciplinary proceedings. We have printed in our appendix the Decision of Judge Smith of the Court of Appeals of *Maryland State Bar Association, Inc. vs. Richard L. Sugarman.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN B. WALSH,
Attorney for Respondents,
10 Ellicott Square Court,
Buffalo, New York 14203.

Dated: Buffalo, New York, August 7, 1975.

To:

Supreme Court of the United States,
Federal Building,
Washington, D.C.

James P. Shea,
Attorney for Petitioners,
Western Building,
Buffalo, New York 14202.

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 508—September Term, 1974.

(Argued February 19, 1975 Decided April 3, 1975.)

Docket No. 74-2183

ANONYMOUS, an Attorney Admitted to Practice in the State of New York,

Plaintiff-Appellant,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

Defendants-Appellees.

Before:

ANDERSON, MULLIGAN and VAN GRAAFEILAND,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Hon. Thomas P. Griesa, *Judge*, denying plaintiff's motion for a preliminary

injunction and granting defendants' motion to dismiss the complaint, which sought injunctive and declaratory relief against the use by the defendants in disciplinary proceedings commenced by them against the plaintiff attorney of grand jury testimony compelled from the plaintiff under a grant of immunity.

Affirmed.

Arthur S. Olick, New York, New York (Anderson, Russel, Kill & Olick, New York, New York, Steven M. Pesner, of Counsel), for Plaintiff-Appellant.

Saul Friedberg, New York, New York, for Defendants-Appellants.

MULLIGAN, *Circuit Judge:*

The plaintiff is an attorney at law admitted to practice in the State of New York. On October 18, 1968, he was called to testify before a New York County grand jury which was then investigating possible undue influence upon the New York City Planning Commission. Before he testified he was granted transactional immunity,[1] and he there-

[1] The grant of immunity was made in the following manner:

The granting of immunity means you cannot be prosecuted for any State violation as a result of your testimony here today or documents that you may have produced here today. However, you can be prosecuted for the crime of perjury, or if you lie to this Grand Jury, tell the Jury something that is not truthful, and for the crime of contempt, if you refuse to answer a question, a legal, proper and relevant question, or if you give an answer that can be deemed to be evasive.

. . .

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after testified on October 18, November 15 and November 21, 1968. On February 4, 1971, a justice of the Supreme Court, New York County, issued an order which authorized the District Attorney of New York County to release the minutes of the plaintiff's testimony to the Grievance Committee of the defendant Association of the Bar of the City of New York (Committee), and, pursuant to the order, some 1500 pages of minutes were delivered to the Committee in March, 1971. On January 11, 1973, the Committee invited the plaintiff to appear and discuss his grand jury testimony in connection with a review by the Committee of the conduct of certain attorneys who had appeared before the grand jury in 1968. Plaintiff did not appear before the Committee but rather submitted through counsel, on April 26, 1973, a twenty-five page statement which, in substance, provided all the information contained in his earlier grand jury testimony. On May 31, 1973, counsel for the Committee instituted a disciplinary proceeding against the plaintiff by serving on him a notice containing the charge made against him and the alleged facts upon which it was based. On June 13, 1973, plaintiff submitted an answer substantially admitting the facts set forth by counsel for the Committee but denying knowledge of any illegal

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(Footnote continued from preceding page)

I remind you that immunity is still in effect and I also caution you that if this Grand Jury believes that you are avoiding or attempting to avoid giving answers to the questions or deliberately avoiding giving answers to questions, that you can be charged with contempt for that; and if you lie to this Grand Jury, that you can be charged with the crime of perjury.

. . .

As I explained before, those are the only two State crimes that you can be charged with as a result of your testimony here today or documents that you produce here.

activity which may have taken place with regard to the Planning Commission.

A hearing was held before a panel of the Committee on June 21, 1973, and the plaintiff appeared with counsel. The grand jury minutes containing plaintiff's testimony were admitted in evidence without objection by plaintiff's then counsel. The panel sustained the charges and made the recommendation that further disciplinary proceedings be brought in the Appellate Division, First Department, of the New York Supreme Court. Thereafter, plaintiff obtained new counsel, who requested a new hearing on the ground, *inter alia*, that the use of the immunized grand jury minutes violated plaintiff's constitutional rights under the Fifth Amendment. A new hearing was granted by the Committee, and, on April 16, 1974, a new charge letter was sent to the plaintiff; the hearing was held on May 7, 1974 before a new panel of the Committee. The grand jury minutes were again offered, and, this time over the objection of plaintiff's counsel, were admitted into evidence. The hearing was then adjourned until June 4, 1974. On that date, plaintiff commenced an action in the United States District Court for the Southern District of New York for declaratory and injunctive relief under 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

Plaintiff moved by order to show cause for a preliminary injunction and the defendants made a cross-motion for judgment dismissing the complaint for failure to state a claim on which relief could be granted. Both motions were heard on July 3, 1974 before Hon. Thomas P. Griesa, United States District Judge, who handed down an opinion and order dated July 31, 1974, which denied the plaintiff's

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motion and granted the defendants' cross-motion dismissing the complaint. This appeal followed. Further proceedings by defendants have been stayed pending the determination of the appeal by this court.

I

The court below did not reach the constitutional issue raised by the plaintiff (the impropriety of defendants' use of plaintiff's compelled testimony in disciplinary proceedings against him) but based its determination on the ground of abstention, relying upon *Younger v. Harris*, 401 U.S. 37 (1971) and the application of its doctrine by this court in *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972). In *Erdmann*, the justices of the Appellate Division, First Department, of the State of New York had served upon the plaintiff a petition and order to show cause charging him with ethical violations arising from statements attributed to him in an article in which he allegedly attacked, in colorful terms, the competence and the character of the state trial and appellate courts. *Erdmann* brought an action in the United States District Court for the Southern District of New York, urging that the proceeding brought by the justices was for the purpose of discouraging and preventing his exercise of First Amendment rights. This court unanimously held that the abstention doctrine of *Younger v. Harris, supra*, was applicable and required dismissal of the complaint, with both the majority opinion of Judge Mansfield (writing also for Judge Mulligan) and the concurring opinion of Judge Lumbard emphasizing our reluctance, and indeed refusal, to intrude in the application of standards of professional conduct and moral character by state courts to their court officers. Thus, Judge Mansfield observed:

> The relationship between a court and those practicing before it is a delicate one. It would appear axiomatic that the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large. It requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness.

458 F. 2d at 1210. Judge Lumbard also stated:

> While these principles [*Younger* absention] were stated in cases involving state criminal proceedings, I believe that they apply with equal force to proceedings regarding the conduct of members of the state bar. The state "has a legitimate interest in determining whether [an individual] has the qualities of character and the professional competence requisite to the practice of law." Baird v. State Bar of Arizona, 401 U.S. 1, 7, 91 S.Ct. 702, 706, 27 L.Ed.2d 639 (1971). Indeed the state's responsibility in these matters is primary. A lawyer to practice anywhere in the United States must first be admitted to the bar of one of the states. In New York, as in all of the states, the proper functioning of the judicial system depends upon the competence and integrity of the members of the bar and their compliance with appropriate standards of professional responsibility.

458 F.2d at 1213.

Appellant's principal assault upon *Erdmann* is founded upon the contention that *Younger* abstention does not properly apply since the pending disciplinary proceedings are civil in nature, although appellant somewhat anomalously asserts at the same time that they are criminal

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with respect to the vesting of Fifth Amendment privileges. Appellant claims that *Erdmann* has been eroded by Judge Smith's comment in his opinion for this court in *Blouin v. Dembitz*, 489 F.2d 488, 490-91 (1973) that *Younger* abstention should be limited to cases involving traditional criminal proceedings until the Supreme Court instructs otherwise. The opinion did not cite *Erdmann* and of course did not purport to override it. More significantly, however, the Supreme Court has recently instructed otherwise and has explicitly extended the *Younger* doctrine so that its application does not depend upon the simplistic civil-criminal dichotomy.

In *Huffman v. Pursue, Ltd.*, 43 U.S.L.W. 4379 (U.S. March 18, 1975), a sheriff and a prosecuting attorney of an Ohio county instituted a proceeding under a state statute which provided that a place which exhibits obscene films is a nuisance; the statute mandated closure for up to a year as well as authorizing preliminary injunctive relief, the sale of all personal property used in conducting the nuisance and the release of the closure order only upon the satisfaction of certain conditions. The state court determined that the theatre in question had exhibited obscene films and ordered its closure for a year. Appellee, Pursue, Ltd., successor to the leasehold to the theatre, rather than appealing the state court order filed suit based on 42 U.S.C. § 1983 in the federal district court, seeking a declaration that the Ohio statute was unconstitutional and also requesting injunctive relief. A three-judge district court concluded that the statute constituted an overly broad prior restraint on First Amendment rights and issued permanent injunctive relief.

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On direct appeal the Supreme Court vacated the lower court decision, holding *Younger* applicable. Mr. Justice Rehnquist noted in his opinion for the Court that, while *Younger* did involve pending criminal proceedings, the Court in that case had explained that

> this doctrine "is reinforced by an even more vital consideration," an aspect of federalism which we described as
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> > "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."
> >
> > *Id.*, at 44.
>
> Central to *Younger* was the recognition that ours is a system in which
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> > "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Ibid.*

Id. at 4382.

The *Huffman* Court stated further that:

> interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles."

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> The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceedings such as this quite as much as it is to a criminal proceeding.

Id. at 4383 (citation omitted).

In addition to its basic underpinnings of federalism and comity, *Younger*, the *Huffman* Court indicated, also rested upon the traditional reluctance of courts of equity to interfere with criminal proceedings.

> [W]hatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding.

Id.

Huffman thus establishes that the principles of comity and federalism which are at the heart of *Younger* are not to be discarded simply because the state action sought to be enjoined is yclept civil.[2] The further inquiry is whether

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[2] The rejection of the civil-criminal litmus test in *Huffman* was presaged by other circuits, in addition to our own holding in *Erdmann*. *Lynch v. Snepp*, 472 F.2d 769, 773 (4th Cir. 1973), cert. denied, 415 U.S. 983 (1974); *Palaio v. McAuliffe*, 466 F.2d 1230, 1232-33 (5th Cir. 1972); *Cousins v. Wigoda*, 463 F.2d 603 (7th Cir.), application for a stay denied, 409 U.S. 1201 (1972). In denying the stay in *Cousins*, Justice Rehnquist noted:

> While *Younger* and its companion cases involved state criminal prosecutions, the principles of federal comity upon which it was based are enunciated in earlier decisions of this Court dealing with civil as well as criminal matters.

409 U.S. at 1205.

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the proposed interference in the civil case is comparable to the disruption in *Huffman* of the state's interest in maintaining the standards of its criminal laws. We noted in *Erdmann* that the Supreme Court (*In re Ruffalo*, 390 U.S. 544, 551 (1968)) had characterized disbarment proceedings to be "of a quasi-criminal nature." 458 F.2d at 1210. They are thus similar to the Ohio civil closure and injunctive procedures in *Huffman* and involve much more than private litigation between individual litigants.

The interest of the state court in adjudicating the continuing professional fitness and character of its own officers is at least as great as the interests of the State of Ohio in policing the exhibition of pornographic material. Today more than ever, the integrity of the bar is of public concern and the state which licenses those who practice in its courts, and which is the only body that can impose sanctions upon those admitted to practice in its courts, should not be deterred or diverted from the venture by the interloping of a federal court. As Mr. Justice Frankfurter observed in *Theard v. United States*, 354 U.S. 278, 281 (1957), the "two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included."

Whatever federal constitutional questions are involved here can certainly be raised in the state courts and ultimately addressed to the Supreme Court, and appellant proffers no contrary contention.[3]

[3] The only other authority for the debility of *Erdmann* suggested by the appellant was the following *en passant* comment of Judge Oakes in a footnote in his dissenting opinion in *Tang v. Appellate Division*, 487 F.2d 138, 146 n.4 (2d Cir .1973), cert. denied, 416

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II

Appellants seek to distinguish *Erdmann* by pointing out that the attorney-plaintiff in that case was seeking to enjoin a proceeding actually pending in the Appellate Division whereas the injunctive relief sought here is only to be directed to the Grievance Committee of the Bar Association. We do not consider the distinction to be meaningful. Section 90(2) of the New York Judiciary Law[4] pro-

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U.S. 906 (1974): "Even application of the doctrine of 'comity' in the disciplinary context in *Erdmann* is open to dispute, moreover, in view particularly of the Supreme Court's recent decision in *Gibson v. Berryhill*, 411 U.S. 564 . . . (1973)." In *Gibson*, the plaintiffs had brought an action against the Alabama Board of Optometry and the Alabama Optometric Association under 42 U.S.C. § 1983, seeking to enjoin administrative proceedings concerning professional misconduct brought against plaintiff optometrists. The Court held that *Younger* was not applicable since the claim was made that the Board was biased and unconstitutionally constituted and there was thus no opportunity for a competent state tribunal to decide the federal issues involved. This distinction was observed in *Huffman*, 43 U.S.L.W. at 4380. Aside from this, *Gibson* involved administrative and not judicial proceedings. There is here, of course, no claim of constitutional infirmity in the judicial body or its agent Committee. Even before *Gibson* the applicability of *Younger* to administrative proceedings was announced in *Geiger v. Jenkins*, 401 U.S. 985 (1971). In any event, it is now apparent that predictions of *Erdmann's* demise were premature.

[4] Section 90 (2) provides:

> The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

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vides that the Appellate Division of the Supreme Court in each Department is authorized to censure, suspend or remove from office counsellors-at-law admitted to practice. Rule 603.12 of the Rules of the Appellate Division, First Department,[5] empowers the Grievance Committee of the defendant Association to conduct preliminary investigations of professional misconduct and to issue subpoenas in the name of the presiding justice. The Committee has an office and a staff to perform this function as an arm of the court, much as a special master appointed in the federal court. See *Erdmann v. Stevens, supra*, 458 F.2d at 1209. As Chief Judge Fuld, writing for a unanimous court in *Wiener v. Weintraub*, 22 N.Y. 2d 330, 331-32, 292 N.Y.S. 2d 667, 668-69 (1968), noted:

> Petitions or complaints charging professional misconduct of an attorney which, in the past, were presented to the General Term of the Supreme Court are now

[5] Rule 603.12 provides:

(a) Upon application by the chairman or acting chairman of the Committee on Grievances of the Association of the Bar of the City of New York, or the Committee on Discipline of the New York County Lawyers' Association, or the Committee on Grievances of the Bronx County Bar Association, or the Co-Ordinating Committee on Discipline, disclosing that such committee in conducting a preliminary investigation of professional misconduct on the part of an attorney, or upon application by an attorney under such investigation, the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of witnesses and production of books and papers before such committee, or any subcommittee of such committee, designated in such application, at the time and place within the First Judicial Department that said committee, or subcommittee, regularly meets.

(b) Each committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths.

> usually filed with the Grievance Committee of a bar association. And, it has been observed, a proceeding before such a committee constitutes a "judicial proceeding." In the investigation of such complaints and in the conduct of such proceedings, then, the bar association's Grievance Committee acts as a quasi-judicial body and, as such, is an arm of the Appellate Division.

(Citations omitted). See also *Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958) (holding the order of a district court judge, which authorized the transmittal of federal grand jury minutes to the Grievance Committee of the Association of the Bar of the City of New York, to be within Fed. R. Crim. P. 6(e), which provides for disclosure of matters occurring before a grand jury when so ordered by a court "preliminarily to or in connection with a judicial proceeding.").

The fact that the Appellate Division may disregard the recommendations of the Committee emphasizes the role of that bench in determining the continuing qualifications of its bar. Interfering with its regular processes of investigation at this point would thwart that prerogative just as much as if the injunction had been sought at a later date. In our view, had Judge Griesa issued an injunction, there would have been an interference with a state judicial proceeding.

III

Appellant urges other reasons for avoiding *Younger* and *Erdmann* which are not persuasive. In *Younger*, as this court has recently pointed out in *Gajon Bar & Grill, Inc. v. Kelly*, slip op. 613 (Dec. 5, 1974), the Supreme Court emphasized that normally there should be no interference with state court proceedings absent very special circum-

stances involving danger of great and immediate irreparable loss. 401 U.S. at 45. The appellant here urges that the failure of the Committee to institute proceedings against him until 1973, although he testified before the grand jury in 1968 and the Committee obtained the minutes in 1971, constitutes such bad faith as to make *Younger* inapplicable.

In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), the Court found that the actions of state prosecutors were so harassing that, if the appellants had been denied federal relief, they would have suffered irreparable injury far beyond that associated with the defense of a single prosecution brought in good faith, which is the standard for intervention set by the *Younger* Court, 401 U.S. at 48. However, in *Dombrowski*, the appellants had offered to prove

> that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that . . . the prosecutor was continuing to threaten to initiate new prosecutions of appellants under the same statutes [whose doubtful constitutionality induced appellants to seek federal injunctive relief], was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use other copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes.

Younger v. Harris, supra, 401 U.S. at 48.

All that is urged here to establish harassment is the lapse of time between the giving of the grand jury testimony and the initiation of the disciplinary proceeding.

There is no showing of bad faith and no showing that the delay prejudiced the appellant or precluded him from defending the charges made in the disciplinary proceeding. He appeared by counsel and he was given a second hearing at his request, but, before even knowing of the determination of the second panel, he proceeded to the federal court. There is no indication that the defendants were "out to get" the plaintiff or that there was no basis in fact for bringing the action. *Allee v. Medrano*, 416 U.S. 802, 819, 836 (1974). In fact, the record indicates, if anything, solicitude for his rights.

Appellant also urges that absention should not be invoked here because prior opinions of the New York courts have consistently held that attorneys may be disciplined even though solely on the basis of immunized testimony. Assuming that this is the fact, although we do not reach the merits here, the argument hardly rises to the magnitude of the "extraordinary circumstance" which appellant characterizes it in an effort to come within the *Younger* rule. The courts in New York are certainly competent to consider and determine federal constitutional questions, and if, as appellant claims, the United States Supreme Court has made contrary decisions construing the application of Fifth Amendment rights in disbarment proceedings, the New York courts are no more free to disregard them than we are. The expectation of lack of success on the constitutional questions at the state level cannot be equated with the arbitrary disregard of constitutional rights referred to in such cases as *Dombrowski* and *Allee, supra*. There is no suggestion that the New York courts are either hostile to the plaintiff or that they are deliberately ignoring or disregarding Supreme Court precedent.

If the appellant does not persuade the state courts to adopt his view, he can ultimately seek relief in the Supreme Court. The Supreme Court rejected a contention similar to appellant's in *Huffman v. Pursue, Ltd., supra:*

> [W]e are of the opinion that the considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believe that his chances of success on appeal are not auspicious. . . . Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.

43 U.S.L.W. at 4385.[6]

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[6] The only authority cited by appellant is *Helfant v. Kugler,* 484 F.2d 1277 (3d Cir. 1973), reconsidered *en banc,* 500 F.2d 1188, cert. granted, 95 S. Ct. 492 (1974). The facts in that case are totally different from those before us, and, as the court there repeatedly stressed, *e.g.,* 500 F.2d at 1197, were extraordinary. A state court judge who had taken the Fifth Amendment before a grand jury investigating corruption was called into the chambers of the New Jersey Supreme Court, where he was questioned by members of that court as to why a judge should take advantage of the constitutional privilege. He advised the court that he would testify; he did and was later indicted. He then claimed that his testimony before the grand jury was coerced by the Jersey Supreme Court. His federal action, which alleged that his Fifth Amendment rights had been violated by the very court which would ultimately determine the merits of his case and which could make its own findings of fact *de novo,* sought declaratory and injunctive relief against the pending state prosecution. The Third Circuit denied the plaintiff's request for injunctive relief upon the authority of *Younger v. Harris,* but held that *Younger* did not preclude the issuance of limited declaratory relief as to the voluntariness of his grand jury testimony in light of the extraordinary circumstances making resort to the state courts on the voluntariness question an inadequate remedy. These "extraordinary circumstances" certainly do not appear here. There is not a hint or even an allegation of any improper involvement by the Committee or the state courts in appellant's case.

Finally, appellant argues that, if he is not entitled to injunctive relief, he is at least deserving of a declaratory judgment on the constitutional issue. Since we have held that there is a pending judicial proceeding in the state court within the scope of *Younger*, the appellant is clearly not entitled to declaratory relief. *Steffel v. Thompson*, 415 U.S. 452, 461 (1974): *Samuels v. Mackell*, 401 U.S. 66 (1971).

Affirmed.

APPENDIX B

Opinion of the United States District Court by Thomas P. Griesa, U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANONYMOUS, an Attorney Admitted to Practice in the State of New York,

Plaintiff,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

Defendants.

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74 Civ. 2398

GRIESA, *J*.

Plaintiff is an attorney admitted to practice in the State of New York, against whom disciplinary proceedings are pending before the Committee on Grievances of the Association of the Bar of the City of New York (hereafter "Bar Association"). Defendants are the Bar Association and John G. Bonomi, chief counsel to the Bar Association's Committee on Grievances. Plaintiff has brought this action seeking injunctive relief against the use by defendants in the disciplinary proceedings of grand jury testimony

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given by plaintiff under a grant of immunity. Plaintiff claims that such use of compelled testimony is unconstitutional in violation of his Fifth Amendment right against self-incrimination, as made applicable to the states by the Fourteenth Amendment.

Plaintiff has moved for a preliminary injunction. Defendants have cross-moved to dismiss the action on the ground that the complaint fails to state a claim upon which relief can be granted. Plaintiff's motion is denied. Defendants' motion is granted.

Facts

History of the Disciplinary Proceedings

At various times in 1967 and 1968 plaintiff testified before the New York County Grand Jury, under a grant of immunity from prosecution, concerning the role he and others played in certain events in 1965 and 1966. Defendants allege that plaintiff admitted to the grand jury that he had participated as an intermediary in negotiations for the transfer of a sum of money intended to unlawfully block, or delay approval of, an application for a zoning variance then pending before a New York City agency. These alleged activities are the basis of the disciplinary charges presently pending against plaintiff.

Although plaintiff appeared before the grand jury in 1967 and 1968, his name did not come to the attention of the Committee on Grievances, in connection with possible unprofessional conduct, until some time in 1969 or 1970.

On February 4, 1971 defendants obtained an order in New York County Supreme Court authorizing the release

of certain grand jury minutes which included the testimony which had been given by plaintiff.

On January 11, 1973 the Committee requested plaintiff to appear at the Committee's office to discuss his grand jury testimony. Plaintiff retained counsel, who requested that he be permitted to submit a written statement by plaintiff in lieu of a personal appearance. The request was granted, and plaintiff submitted a statement dated April 26, 1973 which detailed his role in the events of 1965 and 1966.

On May 31, 1973 the Committee instituted a disciplinary proceeding against plaintiff by serving on him a written notice of charges of unprofessional conduct concerning the events he testified about before the grand jury. On June 13, 1973 plaintiff submitted an answer admitting certain of the facts alleged by the Committee, but denying any illegal or unprofessional conduct on his part. On June 21, 1973 a hearing was held during which plaintiff's grand jury testimony and his April 26, 1973 statement were received in evidence without any objection by plaintiff or his counsel. Plaintiff also testified on his own behalf, and was cross examined by counsel for the Committee. The panel of the Committee before whom the hearing was held sustained the charges and recommended that a disciplinary proceeding be instituted against plaintiff in the Appellate Division.

On March 7, 1974 plaintiff, having obtained new counsel, appealed to the chairman of the Committee for a new hearing on the basis of certain procedural irregularities and the admission into evidence of plaintiff's grand jury testimony. A new hearing was granted, but the reasons for doing so were not specified.

On April 16, 1974 plaintiff was served with a new notice of charges. On May 30, 1974, in the course of a hearing on the charges, the panel of the Committee hearing the charges received into evidence, over plaintiff's objection, plaintiff's grand jury testimony.

On June 4, 1974 plaintiff filed this action.

Procedures of the Committee on Grievances

The Committee on Grievances is a standing committee of the Association of the Bar of the City of New York. It has authority, derived from Judiciary Law 90, subds. 7 and 8 and Rule 603.12 of the Rules of the Appellate Division, First Department to investigate charges of professional misconduct, to compel the attendance of witnesses and the production of records, to take testimony, to admonish attorneys in appropriate cases and to recommend prosecution of disciplinary proceedings before the Appellate Division.

Where further prosecution is recommended by the Committee, and authorized by the Appellate Division, a *de novo* hearing is held before a referee. The Appellate Division makes findings, and enters an order, based on this new hearing.

It appears that, in proceedings before the Appellate Division, counsel for the Committee are usually appointed to act as prosecutors.

Conclusions of Law

Plaintiff contends that use in the disciplinary proceeding of his grand jury testimony, compelled under a grant of immunity from prosecution, violates his Fifth Amendment right against self-incrimination. Defendants contend that a disciplinary proceeding is not a criminal prosecution, and therefore the Fifth Amendment is not applicable. Defendants assert that the New York courts have explicitly held constitutional such use of compelled testimony, *Matter of Klebanoff*, 21 N.Y.2d 920, 289 N.Y.S.2d 755 (1968). *cert. denied*, 393 U.S. 840 (1968); *Zuckerman v. Gleason*, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967), *cert. denied*, 390 U.S. 925 (1968), and that various decisions of the United States Supreme Court point to the same conclusion. *See, e.g., Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967). Plaintiff contends that these Supreme Court cases and other federal court authorities compel the opposite conclusion.

However, it is inappropriate for me to decide this question because I hold that the doctrine of federal court abstention applies, *Younger v. Harris*, 401 U.S. 37 (1971), and that plaintiff's complaint must be dismissed on this ground.

This result is dictated by the recent decision in *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972). In that case the plaintiff brought an action in the federal district court seeking declaratory and

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injunctive relief against disciplinary proceedings pending against him in the Appellate Division. He claimed that the proceedings were brought with a view to discouraging his exercise of First Amendment rights. The Court of Appeals affirmed the District Court's action in denying an injunction and dismissing the action.

The court held that the abstention doctrine set forth in *Younger v. Harris* applies to a diciplinary proceeding before the Appellate Division. The court found that such proceedings are judicial, not administrative, in nature. Judge Mansfield, writing for himself and Judge Mulligan, noted that it is an open question whether the abstention doctrine applies with respect to state civil suits as well as state criminal prosecutions. He found, however, that it was unnecessary to resolve that question since in his and Judge Mulligan's view "a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding." 458 F.2d at 1209. Judge Mansfield went on to characterize such proceedings as "quasi-criminal" in nature. 458 F.2d at 1211. The opinion of Judges Mansfield and Mulligan also stated that the *Younger* abstention doctrine should be applied because of the unique relationship between the courts of a state and the attorneys admitted to practice before it.

> "The relationship between a court and those practicing before it is a delicate one. It would appear axiomatic that the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large. It requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceed-

> ing against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness." 458 F.2d at 1210.

Judge Lumbard, in a concurring opinion, stated:

> "While these principles [of abstention] were stated in cases involving state criminal proceedings, I believe that they apply with equal force to proceedings regarding the conduct of members of the state bar." 458 F.2d at 1213.

Plaintiff points to language in a dissenting opinion by Judge Oakes in *Tang v. Appellate Division*, 487 F.2d 138, 146 n.4 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3555 (Apr. 1, 1974) as indicating that *Erdmann* may no longer be valid in light of the Supreme Court's recent decision in *Gibson v. Berryhill*, 411 U.S. 564, 575-577 (1973). But it would appear that Gibson is distinguishable from *Erdmann*, since in *Gibson* the disciplinary proceeding sought to be enjoined was before the state Board of Optometry, not any court or any committee acting under powers granted by a court.

It might be argued that the recent case of *Blouin v. Dembitz*, 489 F.2d 488 (2d Cir. 1973), departed to some extent from the rationale of *Erdmann*. In *Blouin* Judge Smith, in an opinion joined by Chief Judge Kaufman and Judge Oakes, stated:

> "But we do believe that the particularly stringent formulation of that doctrine in *Younger* should be limited, at least until the Court instructs otherwise, to cases involving traditionally criminal proceedings." 489 F.2d at 490-491.

However, the fact remains that there has been no express overruling or disapproval of *Erdmann* by the Second Circuit or the Supreme Court. Clearly I am bound by *Erdmann*.

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Plaintiff contends that there is an illogic in defendants' position that, on the one hand, the Fifth Amendment protection against self-incrimination does not apply to a disciplinary proceeding because such proceeding is not criminal in nature, and, on the other hand, the *Younger* abstention doctrine applies because such a proceeding *is* criminal in nature. If there is an anomaly here, plaintiff's position is at least as difficult. Plaintiff argues that a disciplinary proceeding should be held criminal in nature to permit application of the Fifth Amendment privilege, but non-criminal to prevent application of *Younger*.

These problems are interesting to consider, but they do not detract from the controlling force of *Erdmann*, which dictates that I must abstain from interference with the pending disciplinary proceedings against plaintiff. It should be noted, as indicated by the quotations above, that *Erdmann* does not rest solely on the theory that a disciplinary proceeding is comparable to a criminal action, but relies in part on the theory that the courts of a state have a unique interest in their relationship with attorneys practicing in those courts, and the federal courts should be reluctant to interfere with that relationship.

Plaintiff contends that *Erdmann* can be distinguished from the present case, because there the disciplinary proceeding was before the Appellate Division, whereas here the disciplinary proceeding is before the Committee on Grievances. He contends that the present proceedings are not a *pending* state judicial proceeding, and therefore the considerations of equity, comity and federalism underlying the abstention doctrine do not apply. *Steffel v. Thompson*, ____ U.S. ____, 42 U.S.L.W. 4357, 4360 (March 19, 1974).

This contention must be rejected. The court in *Erdmann* described the closely related role of bar associations and the Appellate Division in disciplinary proceedings as follows:

> "Under § 90(2) of the New York Judiciary Law (McKinney's Consol. Laws, c.30, 1968) the Appellate Division of each judicial department in the state is given the exclusive power to resolve issues as to alleged misconduct of attorneys practicing within its jurisdiction. To implement this power it is vested with authority to hold a hearing to determine the facts of the alleged misconduct and to apply to them the relevant standards of conduct laid down in the Code of Professional Responsibility. Although the court, for practical reasons, invokes the assistance of bar associations and their committees to investigate and conduct hearings with respect to complaints regarding members of the bar, just as a federal court may employ special masters to hear and report, Rule 53, F.R. Civ. P., the disciplinary power continues to rest exclusively with the court." 485 F.2d at 1209.

Thus the *Erdmann* decision recognizes that a bar association committee acts to assist the state court, and derives its power from that court. A disciplinary proceeding commenced by a bar association committee and continued before the court is all part of one judicially ordained process. I would find it arbitrary to have the rule of the *Erdmann* case applicable to proceedings actually before the Appellate Division, but *not* applicable to proceedings at the bar association stage.

I note that *Wiener v. Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968), holds that a letter, addressed to a bar association grievance committee and containing accusations against an attorney, is the initiation of a judicial proceeding and therefore absolutely privileged against a claim of libel.

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Plaintiff further contends that the doctrine of abstention should not apply, because it is futile for plaintiff to pursue his constitutional argument in the state courts. Plaintiff argues that the New York courts have conclusively ruled that grand jury testimony compelled under a grant of immunity is admissible in a disciplinary proceeding. *Matter of Klebanoff*, 21 N.Y.2d 920, 289 N.Y.S.2d 755 (1968), *cert. denied*, 393 U.S. 840 (1968); *Zuckerman v. Gleason*, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967), *cert. denied*, 390 U.S. 925 (1968). However, I cannot concede the futility of resort to the "traditional method of obtaining adjudication of federal constitutional questions arising out of . . . disciplinary proceedings"—*i.e.*, state court action followed by request for Supreme Court review. *See Erdmann*, 458 F.2d at 1211. I cannot concede that such a process is futile as to any really meritorious federal constitutional claim.

There is a further reason why federal intervention at this time is inappropriate. Defendants claim that, in failing to object to the use of his grand jury testimony at the first committee hearing in 1973, plaintiff waived any Fifth Amendment claim he may have had. On the other hand, plaintiff asserts that there was never any intention to waive any claims. This factual issue, if determined adversely to plaintiff, might moot the broader constitutional issue of whether testimony compelled under a grant of immunity may be used in a disciplinary proceeding. It would seem appropriate to permit the state courts to pass on this waiver issue.

Plaintiff claims that the court should nonetheless intervene since the disciplinary proceeding is brought in bad faith. *See Younger v. Harris*, 401 U.S. 37, 54 (1971).

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Plaintiff claims that there was a two-year delay in initiating the disciplinary proceeding from the time the grand jury transcripts became available. But such a delay hardly amounts to the kind of bad faith and harassment, with no hope of ultimate success in the prosecution, which the courts have found necessary to justify making an exception to the general rule of abstention. *E.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965).

Plaintiff raises an additional argument about bad faith. Plaintiff asserts that at the time he was granted immunity, prior to testifying before the grand jury, the District Attorney's office led him to believe that the testimony would not be referred to the Committee on Grievances, nor would the District Attorney's office recommend to the Committee that disciplinary action be taken. However, I conclude that this argument does not raise the kind of "bad faith" issue referred to in the abstention cases. This argument raises another factual and legal issue appropriate for decision in the state courts—*i.e.*, the scope of the agreement made with plaintiff at the time of his testimony.

Conclusion

Plaintiff's motion for a preliminary injunction is denied, and defendants' motion to dismiss the complaint is granted.

So ordered.

Dated: New York, New York, July 31, 1974.

s/ THOMAS P. GRIESA,
U. S. D. J.

APPENDIX C

Opinion by Smith, J.

IN THE

COURT OF APPEALS OF MARYLAND

Miscellaneous Docket
(Subtitle BV)
No. 5
September Term, 1974

MARYLAND STATE BAR ASSOCIATION, INC.,

v.

RICHARD L. SUGARMAN.

Murphy, C.J., Singley, Smith, Digges, Eldridge, O'Donnell, JJ.

Opinion by Smith, J.

Filed: December 9, 1974.

Once again we are faced with the unpleasant task of disciplining a member of the bar of this Court. It is possible that the misconduct of the attorney here might not have come to light had it not been for the ongoing probe of Maryland political corruption.

The facts are not in dispute. Two questions are before us, whether testimony compelled under a Federal immunity statute, 18 U.S.C. §§ 6002-6003, may form the evidentiary base for disciplinary action and whether disbarment is the appropriate disposition of this case. We shall answer both questions in the affirmative.

Richard L. Sugarman was admitted to the bar of this Court on November 26, 1968, after examination. He has maintained an office for the practice of law in Montgomery County.

On June 10, 1974, pursuant to an authorization of its Board of Governors on April 10, 1974, the Maryland State Bar Association, Inc., filed its petition in this Court praying disciplinary action against Sugarman. The petition, filed pursuant to the provisions of Maryland Rule BV3, alleged that Sugarman "ha[d] committed acts of professional misconduct, ha[d] engaged in conduct prejudicial to the administration of justice, ha[d] committed acts of fraud and deceit, ha[d] acted contrary to Canons 1, 7 and 9 of the Code of Professional Responsibility and ha[d] violated Disciplinary Rules 1-102, 7-102, and 9-102 of the Code of Professional Responsibility," adopted by Rule 1230. The matter ultimately came on for hearing before a panel of three judges of the Sixth Judicial Circuit designated by us under the provisions of Rule BV3b to hear the matter in the Circuit Court for Montgomery County.

A large part of the evidence against Sugarman came from his testimony this spring as a witness for the Government in the trial of United States v. N. Dale Anderson, Criminal No. 73-0527-Y, in the United States District Court

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for the District of Maryland. The United States Attorney filed a motion in that case for "an order pursuant to the provisions of Title 18, United States Code, Section 6001 et seq., compelling Richard Lewis Sugarman to give testimony or provide other information, which he refuses to give or provide on the basis of his privilege against self-incrimination," reciting that the application was "made with the approval of Henry E. Petersen, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, pursuant to the authority vested in him by 18 U.S.C. 6003 and 28 C.F.R. 0.175." An order of that court was duly passed on February 14, 1974, requiring Sugarman to "give testimony or provide other information which he refuse[d] to give or provide on the basis of his privilege against self-incrimination as to all matters about which he [might] be interrogated at said trial."

The hearing panel in the Circuit Court of Montgomery County, said that "[t]he evidence is overwhelming that [Sugarman], by his own admissions, did engage in improper and illegal transactions for a client, one Joel Kline; and did purchase and sell stock in his own name with the fraudulent purpose of assisting said client in avoiding income taxes." It also said that he "did receive moneys from said Kline for the purpose of disguising custody by exchange of checks, commingling the bank accounts by the 'laundering' of moneys received from his client with fraudulent and deceitful purpose" and "[t]he rendering and delivering of financial statements for professional services to the client Kline, which services were not rendered, [was] particularly distressing and was clearly for the purpose of enabling Kline to use such statements as tax or business deductions. Disbarment was recommended.

The immunity statute to which reference has been made, 18 U.S.C. § 6002, provides in pertinent part:

> "§ 6002. Immunity generally
>
> "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States, . . .
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

The crux of the question here raised by Sugarman may be stated as whether a disciplinary action against an attorney involves a potential criminal or quasi-criminal sanction for the purpose of the privilege against self-incrimination provided by the Fifth Amendment to the Constitution of the United States.

Sugarman bases his hopes here upon *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L.Ed.2d 212 (1972), and *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L.Ed.2d 574 (1967).

In *Kastigar* the Court held that the immunity granted by 18 U.S.C. § 6002 was coextensive with the Fifth Amendment privilege against self-incrimination and, therefore, the statute was constitutional since the grant of immunity

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supplanted the privilege and protected a person to the same extent. In that case the petitioners were called to testify before a grand jury where they claimed their privilege against self-incrimination. They were granted immunity pursuant to the statute. They still refused to testify on the ground that the immunity was not coextensive with the privilege. They were held in contempt and ordered confined. Mr. Justice Powell for the Court held that the Fifth Amendment did not require "transactional immunity," but only "use and derivative use immunity" which was granted by the statute in question.

> "This is very substantial protection, commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that *the compelled testimony can in no way lead to the infliction of criminal penalties.* The statute, like the Fifth Amendment, grants neither pardon nor amnesty." *Id.* at 461. (Emphasis added.)

The emphasized language relates to the provisions of § 6002 in that the statute prohibits the use of testimony given under grant of immunity in any subsequent "criminal case." A "criminal case" is one that may "lead to the infliction of criminal penalties." Accordingly, if disbarment is a criminal penalty, then a disciplinary proceeding is a criminal proceeding and, pursuant to § 6002, which supplanted the constitutional privilege, the testimony given under the grant of immunity could not be utilized. Thus, the issue in this case becomes whether disbarment is a criminal penalty which cannot be inflicted on the basis of compelled testimony. The Supreme Court of the United States has

not expressly answered the question. Nothing in *Spevack* or in *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), bears precisely upon the point.

In *Spevack*, a New York lawyer had refused to honor a subponena *duces tecum* served on him in that he refused to produce the demanded financial records and refused to testify at the judicial inquiry. His sole defense was that the production of those records and his testimony would tend to incriminate him. The Appellate Division of the New York Supreme Court ordered him disbarred, holding that the constitutional privilege against self-incrimination was not available to him under the holding of *Cohen v. Hurley*, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961). The Court of Appeals of New York affirmed. Mr. Justice Douglas announced the judgment of the Court and delivered an opinion in which three other justices joined. He said:

> "We conclude that *Cohen v. Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." *Id.* at 514.
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> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary to convict him • • •.' *United States v. White*, 322 U.S. 694, 698, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542." *Id.* at 516.

Spevack must be read in the light of the fact that Mr. Justice Fortas, in concurring in the judgment and in the overruling of *Cohen v. Hurley,* said:

> "If this case presented the question whether a lawyer might be disbarred for refusal to keep or to produce, upon properly authorized and particularized demand, records which the lawyer was lawfully and properly required to keep by the State as a proper part of its functions in relation to him as licensor of his high calling, I should feel compelled to vote to affirm, although I would be prepared in an appropriate case to re-examine the scope of the principle announced in *Shapiro v. United States,* 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948). I am not prepared to indicate doubt as to the essential validity of *Shapiro.*" *Id.* at 520.

Four justices dissented in that case, making the Fortas vote essential to the holding.

The Supreme Court did not say in *Spevack* that a disciplinary proceeding was a criminal proceeding. The only reason that the privilege against self-incrimination was involved was because the attorney's testimony if given, so it was claimed, would have incriminated him in the conventional sense of that word, that is his testimony would have subjected him to possible prosecution under the New York penal code for solicitation and fee splitting. This view of *Spevack* is shared by R. Niles and J. Kaye, *Spevack v. Klein: Milestone* or *Millstone in Bar Discipline?* 53 A.B.A.J. 1121 (1967), and M. Franck, *The Myth of Spevack v. Kline,* 54 A.B.A.J. 970 (1968). They also discuss an immunity grant and the subsequent use of the testimony in a disciplinary proceeding. Both support the view we shall take here today.

Ullman v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), is relevant here. There the petitioner was convicted of contempt after refusing to testify before a grand jury. He had been granted immunity pursuant to the provisions of the Immunity Act of 1954, 68 Stat. 745, 18 U.S.C. (Supp. II) § 3486. However, he contended that his testimony might lead to loss of his job. Mr. Justice Frankfurter said for the Court:

> "[T]he immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege: 'The interdiction of the 5th Amendment operates only where a witness is asked to incriminate himself,—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply.' *Hale v. Henkel,* 201 U.S. 43, 67, 26 S.Ct. 370, 376, 50 L.Ed. 652. Here, since the Immunity Act protects a witness who is compelled to answer to the extent of his constitutional immunity, he has of course, when a particular sanction is sought to be imposed against him, the right to claim that it is criminal in nature." *Id.* at 431.

His conviction was affirmed.

Pertinent to the inquiry here is *Matter of Rouss,* 221 N.Y. 81, 116 N.E. 782 (1917). Jacob Rouss had been compelled under a New York statute to give testimony against five New York City police inspectors who had been indicted for conspiracy to obstruct justice through the suppression of an individual's testimony. In the course of that trial it was established that Rouss had entered into an arrangement with a potential witness by which for a money consideration that person would keep without the state. Charges of professional misconduct were then preferred against Rouss. The statute provided that "no person

[should] be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he [might] so testify or produce evidence, documentary or otherwise, and no testimony so given or produced [should] be received against him, upon any criminal investigation, proceeding or trial." As Judge Cardozo put it for the New York court, the question became "whether disbarment is a penalty or forfeiture within the meaning of that statute." In the process of holding that it was not, he said:

> "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards (*Selling v. Radford,* 243 U.S. 46; *Matter of Durant,* 80 Conn. 140, 147). Whenever the condition is broken, the privilege is lost. *To refuse admission to an unworthy applicant is not to punish him for past offenses.* The examination into character, like the examination into learning, is merely a test of fitness. *To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied.* For these reasons courts have repeatedly said that disbarment is not punishment (*Ex parte Wall,* 107 U.S. 265; *Matter of Randall,* 11 Allen, 473, 480; *Matter of Randel,* 158 N.Y. 216; *Boston Bar Assn. v. Casey,* 211 Mass. 187, 192; *Matter of Durant,* [80 Conn. 140]). 'The question is,' said Lord Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion' (*Ex parte Brounsal,* [2] Cowp. 829). 'It is not,' he continued, 'by way of punishment; but the court, on such cases, exercise their discretion whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.' This ruling was announced after consultation with all the judges, 'as

it is for the dignity of the profession that a solemn opinion should be given.' On that high plane the jurisdiction was thus early placed, and in that high spirit it has been exercised. Even pardon will not elude it. Pardon blots out the offense, and all its penalties, forfeitures and sentences; but the power to disbar remains (*Matter of an Attorney*, 86 N.Y. 563). We do not need to inquire now whether the power is so essential and inherent that the legislature may not take it away (*State ex rel. Wood v. Raynolds*, 158 Pac. Rep. 413, and cases there cited). At least we will not hold it to have been taken away by words of doubtful meaning. We will not declare, unless driven to it by sheer necessity, that a confessed criminal has been intrenched by the very confession of his guilt beyond the power of removal." *Id.* at 84-85. (Emphasis added.)

Contentions similar to that raised by Sugarman were considered and rejected in *In re Klebanoff*, 21 N.Y.2d 920, 237 N.E.2d 75, 289 N.Y.S.2d 755, *cert. denied*, 393 U.S. 840 (1968), and in *In re Schwarz*, 51 Ill.2d 334, 282 N.E.2d 689, *cert. denied*, 409 U.S. 1047 (1972). In the latter case the court summarily disposed of the issue by stating:

"It is argued, however, that unless article 106 is read to include immunity from professional discipline, the respondent's rights under the fifth amendment to the constitution of the United States will be violated. In support of this contention, respondent relies heavily upon *Spevack v. Klein* (1967), 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625. He contends that the holding of that case serves in a general way to make 'the privilege against self-incrimination applicable to a disbarment proceeding.' In our view this interpretation is much too broad. 'Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying.' (*Gardner v. Broderick* (1968), 392 U.S. 273, 276, 20 L.Ed.2d 1082, 1085, 88 S.Ct. 1913.)

The respondent has not been prosecuted criminally by reason of his testimony, and his fifth amendment rights have not been violated.

"The report and recommendation of the commissioners is approved and the respondent is disbarred." *Id.* at 37-38.

This Court has said specifically that disciplinary proceedings for professional misconduct are not criminal proceedings. *Balliet v. Balto. Co. Bar. Ass'n,* 259 Md. 474, 478, 270 A.2d 465 (1970), and *Braverman v. Bar Assn. of Balto.,* 209 Md. 328, 336, 121 A.2d 473, *cert. denied,* 352 U.S. 830 (1956).

The Lord Mansfield Rule quoted by Judge Cardozo in *Rouss* was quoted by Judge Markell for this Court in *In re Meyerson,* 190 Md. 671, 675-76, 59 A.2d 489 (1948), and, more recently, by Judge Digges for the Court in *Balliet,* 259 Md. at 478. In *Maryland State Bar Association, Inc. v. Frank,* 272 Md. 528, 325 A.2d 718 (1974), we considered and rejected a contention that where an individual had been found not guilty under a criminal indictment disciplinary proceedings on the same charges could not be maintained against him because to do so would place him in jeopardy for the second time.

The traditional view of disbarment, as set forth by Lord Mansfield, has been that it is not intended as punishment to the individual, but as protection to the public from such individuals. The special relationship of the bar to the courts was pointed out in *In re Cannon,* 206 Wis. 374, 240 N.W. 441 (1932), where the court said:

"The relation of the bar to the courts is a peculiar and intimate relationship. The bar is an attaché of the courts. The quality of justice dispensed by the courts

> depends in no small degree upon the integrity of its bar. An unfaithful bar may easily bring scandal and reproach to the administration of justice and bring the courts themselves into disrepute." *Id.* at 383.

The South Dakota court observed in *In re Petition of Morrison*, 45 S.D. 123, 186 N.W. 556 (1922), when faced with many endorsements of reinstatement:

> "Some twenty or more think petitioner has suffered sufficient *punishment*—apparently forgetting that disbarment is not imposed as a punishment, but as a necessary means of protection to society, and that, as long as society may need protection, this court has no right to deny such protection merely because an individual may suffer from not being allowed to hold the power to injure society. Many urge that the *punishment* he has suffered will deter him from future wrongdoing, forgetting that it is not fear as to the consequences of wrongdoing that qualifies one for admission to the bar, but rather an innate desire and intent to follow the right course." *Id.* at 129-30. (Emphasis in original.)

In *Meyerson* Judge Markell cited for the Court *In re Stump*, 272 Ky. 593, 114 S.W.2d 1094 (1938). That court observed:

> "From time immemorial lawyers have in a peculiar sense been regarded as officers of the court. It is a lawyer's obligation to participate in upholding the integrity, dignity, and purity of the courts. He owes a definite responsibility to the public in the proper administration of justice. It is of utmost importance that the honor and integrity of the legal profession should be preserved and that the lives of its members be without reproach. The malpractice of one reflects dishonor not only upon his brethren, but upon the courts themselves, and creates among the people a distrust of the courts and the bar." *Id.* at 598.

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Judge Cardozo concluded his opinion for the Court in *Rouss* by stating:

> "Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided. The claim of immunity from disbarment cannot survive the application of that test. If the exemption protects lawyers, it must equally protect physicians, whose licenses have long been subject to revocation for misconduct (Public Health Law, § 170; Consol. Laws, ch. 45; 1 R.S. 452, § 3; *Matter of Smith*, 10 Wend. 449; *Allinson v. Gen. Council of Medical Education*, [L.R. 1894] 1 Q.B. 750). To great and honorable professions have in that view been denied the right to purify their membership and vindicate their honor. The charlatan and rogue may assume to heal the sick. The knave and criminal may pose as a minister of justice. Such things cannot have been intended, and will not be allowed.
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> "The order of disbarment should be affirmed." *Id.* at 91.

If Sugarman's contention were to prevail, then the decision as to whether an individual would continue to be a member of the bar of this Court might well pass from this Court to the prosecutor empowered to grant immunity, be he State or Federal, because by such a holding this Court could be powerless in the future to protect the public after a grant of immunity to an attorney, no matter how outrageous his conduct might be. For instance, a lawyer might be regarded by a prosecutor as the least important person in a conspiracy between him and others to murder the President of the United States, the Governor of this State, and the Chief Judge of this Court and at the same time to plunder the public treasury. A prosecutor might well think it necessary to grant that lawyer immunity in order to convict others of supposedly more importance. However, a

holding such as that requested by Sugarman would leave us unable to prevent such a conspirator from practicing law unless we had before us *independently* obtained evidence. Even then, there would be a strong burden to show that it was in fact independently obtained. *See Kastigar v. United States, supra*, at 459-61.

Based upon the holdings in the New York and Illinois cases, our repeated statements that disbarment proceedings are not criminal proceedings, *Kastigar*, and the traditional view of Anglo-American jurisprudence that disbarment is intended not as punishment, but as protection to the public, we hold that this proceeding is not a "criminal case" within the purview of 18 U.S.C. § 6002 or the Fifth Amendment to the Constitution of the United States. Therefore, the testimony elicited from Sugarman under the provisions of that act may indeed form an evidentiary basis for disciplinary action against him.

Sugarman urges that if we reject his contention relative to use of the testimony, "then it is submitted that an appropriate disposition would be a reprimand . . . or, at the very most, a short period of suspension." The panel of Judges said in their recommendation:

> "Mr. Sugarman's counsel attempts to persuade us that only a reprimand or suspension is in order, for two reasons—1) that he testified in the trial and ultimate conviction of Dale Anderson and was cooperative to that end, and 2) that he was naive and held Joel Kline in awe and was in fear of this man and of losing him as a client. Neither of these reasons is persuasive to the Panel. He testified only after given immunity from criminal prosecution, and to suggest that fear of loss of business is an excuse for avoiding professional responsibility taxes one's reasoning power. Anyone who uses such judgment is a threat to society in the practice of law.
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> "We find no extenuating circumstances here, and also note that assisting in the willful evasion of income taxes is within the class of felonious crimes involving moral turpitude. Accordingly, to protect the public and to preserve the integrity of the legal and judicial system of Maryland, we recommend that the name of the Respondent, Richard L. Sugarman, be stricken from the rolls of those authorized to practice law in this State."

Since we agree with the reasoning and findings of the panel of judges, we reject the suggestion of Sugarman. His activities reflect his lack of the basic moral character essential to membership in the legal profession. Accordingly, for the protection of the public, the name of Richard L. Sugarman will be stricken from the rolls of those authorized to practice law in this State.

IT IS SO ORDERED.

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